

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 26, 2006

DORMAN O'NEAL ELMORE, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Cumberland County
No. 5849 Lillie Ann Sells, Judge

No. E2005-02263-CCA-R3-PC - Filed August 29, 2006

In February 2001, the Appellant, Dorman O'Neal Elmore, Jr., was convicted by a Cumberland County jury of five counts of rape. Following a sentencing hearing, Elmore received an effective twenty-two year sentence as a violent offender. The motion for new trial, which raised the issues of: (1) sufficiency of the evidence; (2) evidentiary error; and (3) sentencing error, was filed nineteen days after the judgment had become final. Notwithstanding the trial court's lack of jurisdiction to hear the motion, a hearing was conducted, and the motion for new trial was denied. No appeal was taken, and no further action occurred for almost four years, at which time Elmore, proceeding *pro se*, began filing various pleadings seeking status review of his case. Eventually, Elmore was granted a "delayed appeal" of his convictions as authorized by the post-conviction act. No additional motion for new trial was filed. On appeal, Elmore seeks review of the three issues originally presented in his time-barred motion for new trial. After review, we conclude that Elmore's argument with regard to sufficiency of the evidence is without merit, as is his issue of sentencing error. The issue of evidentiary error is waived, as it was not raised in a timely motion for new trial. *See* Tenn. R. App. P. 3(e). Accordingly, the Appellant's judgments of conviction and effective sentence of twenty-two years are affirmed.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Randal R. Boston (on appeal), Crossville, Tennessee; Anthony W. Turner (at trial), Crossville, Tennessee, for the Appellant, Dorman O'Neal Elmore, Jr.

Paul G. Summers, Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; William E. Gibson, District Attorney General; and Anthony J. Craighead, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In May of 2000, a Cumberland County grand jury returned a multi-count indictment charging the Appellant with eight counts of rape of his ex-wife's teenage daughter. Prior to trial, the State dismissed counts four through six of the indictment. June Walker, the victim's mother began dating the Appellant in October of 1996, and the Appellant moved into the Walker home around February of 1997. At trial, the victim testified that the Appellant raped her on five separate occasions. The first incident occurred when the victim's mother took the victim's brother to the hospital in March of 1997, when the victim was thirteen years old. The victim testified that the Appellant, who at the time was wearing a pair of tan shorts, came into her bedroom that evening, and "he took my arms and took them over my head. And he took my pants off and raped me." The victim further testified that she tried to kick the Appellant and push him away without success. The Appellant explained to the victim that because "he couldn't get it from [her] mother, . . . he'd get it from [the victim]." Furthermore, the victim testified that she began to bleed, and the Appellant told her that she had lost her virginity. He also warned the victim that if she told her mother about what happened, he would kill the entire family.

The second such incident occurred the following day. The victim testified that the Appellant picked her up from school and took her home. The two were alone in the house, and the Appellant called the victim upstairs to her mother's bedroom. Believing that the Appellant was going to apologize to her because of his actions the previous night, the victim walked upstairs. At this time, the Appellant again removed the victim's pants, held her down, and raped her, while wearing a condom. The third such event, which the victim testified she believed occurred in April of 1997, took place as the victim sat in the passenger seat of the car near a set of dumpsters in the Linary community of Cumberland County. The Appellant forcibly took the victim's hand from the side of her seat, unzipped her pants, and "stuck his penis in [her] vagina."

The victim moved to West Virginia at the end of the 1997 school year to live with her father. She attended school in West Virginia the following school year. The Appellant and the victim's mother married in February 1998, and the victim returned to Crossville in August of 1998. The Appellant and the victim's mother divorced in October of 1998 but continued to maintain a relationship. The fourth incident took place in October of 1998 when the victim's grandmother sent her with the Appellant to buy a gallon of milk. The victim testified that the Appellant stopped behind Cat's Car Wash, where "he unzipped his pants and stuck [the victim's] hand over his penis. And he stuck it in [her] mouth and started pushing [her] head up and down." Two weeks before Christmas in December of 1998, the fifth incident occurred when the Appellant asked the victim to go to Wal-Mart with him ostensibly to look at a ring for her mother for Christmas. Instead, the Appellant drove the victim to the Camelot community where he told the victim to exit the vehicle. The victim testified, "he pulled my pants down to my ankles and laid me on the hood of his car and stuck his penis in my vagina." The victim kicked the Appellant and "busted his mouth."

Several days before New Years, the victim told her mother and the Appellant in a room full of people that the Appellant had raped her. In response, the victim's mother told the Appellant to get out of the house, and she reported the rapes to law enforcement. The victim's mother continued to communicate with the Appellant and recorded their conversations on two separate occasions, once on the phone and once in person at a park in the presence of the victim. The tape recordings were admitted into evidence with redactions. Initially, the Appellant admitted raping the victim twice, but the victim's mother testified that after the victim listed each incident, the Appellant admitted to each of them.

At the close of proof at the February 15, 2001 trial, the jury found the Appellant guilty of all five counts of rape as indicted. Following a sentencing hearing on April 11, 2001, the trial court sentenced the Appellant to eleven years for each count of rape. For sentencing purposes, counts one, two, and three were grouped together with the sentences running concurrently. Additionally, counts seven and eight were grouped together with the sentences running concurrently. The sentences from the two groups were ordered to be served consecutively for an effective sentence of twenty-two years in the Department of Correction. The judgment of conviction was entered on April 23, 2001.

On June 14, 2001, the Appellant filed a motion for new trial, which was denied. No notice of appeal was filed. The Appellant filed several motions in an attempt to determine the status of his appeal. On October 7, 2004, he filed a *pro se* "Motion to Produce Transcripts/ Records." He also filed a *pro se* Writ of Mandamus on January 24, 2005, alleging that his trial counsel had falsely represented to him that he had in fact filed an appeal. The record reflects that in an order dated March 21, 2005, the trial court appointed post-conviction counsel to represent the Appellant and ruled that it would treat the Appellant's motions as a "Motion for Delayed Appeal and/or Post Conviction Relief Petition."¹

A post-conviction hearing was held on August 31, 2005, at which the Appellant asserted that he was misled to believe that trial counsel had in fact filed an appeal. On September 13, 2005, the trial court entered an order pursuant to Tennessee Code Annotated section 40-30-113 (2003) which provided that "the [Appellant] shall file either an appeal or written waiver of appeal within (30) days herefrom." Relying upon *Wallace v. State*, 121 S.W.3d 652 (Tenn. 2003), the trial court concluded that the Appellant "erroneously believed that trial counsel had filed an appeal and wherefore due process requires a tolling of the [one-year] statute of limitations" for post-conviction petitions. On September 20, 2005, the Appellant filed a notice of appeal.

Analysis

The Appellant presents the instant appeal under the provisions of Tennessee Code Annotated section 40-30-113, commonly referred to as a delayed appeal proceeding under the Post-Conviction Procedure Act. As a preliminary matter, the Appellant admits and the State agrees that the Appellant

¹The record reflects that appointed counsel also filed a separate petition for post-conviction relief seeking the delayed appeal of his rape convictions based upon trial counsel Anthony Turner's failure to do so.

failed to timely file a motion for new trial. A motion for new trial “shall be made . . . within thirty days of the date the order of sentence is entered.” Tenn. R. Crim. P. 33(b). This provision is mandatory, and the time for filing may not be extended. Tenn. R. Crim. P. 45(b); *see also State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997); *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). The thirty-day rule is jurisdictional, and an untimely motion is a nullity. *Dodson*, 780 S.W.2d at 780. It deprives the defendant of the opportunity to argue on appeal any issues that should have been raised in the motion for new trial. *Martin*, 940 S.W.2d at 569. Unlike the untimely filing of the notice of appeal, this court does not have the authority to waive the untimely filing of a motion for new trial. Tenn. R. App. P. 4(a); *see also State v. Givhan*, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980).

The Appellant’s motion for new trial was filed on June 14, 2001, nineteen days after the judgment became final. Accordingly, the trial court improperly heard the motion on June 25, 2001. Tenn. R. App. P. 3(e) provides that “in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.” “Failure to file a written motion for new trial within the required thirty days not only results in the appellant losing the right to have a hearing on the motion, but it also deprives the appellant of the opportunity to argue on appeal any issues that were or should have been presented in the motion for new trial.” *Martin*, 940 S.W.2d at 569. Due to the failure to timely file a motion for new trial, the Appellant has waived the following evidentiary issue: whether the trial court erred in “allowing the jury to listen to the surreptitious tape recordings of a conversation between the Appellant and the victim’s mother.” We decline plain error review of this issue because it does not rise to the level of affecting a substantial right which would necessitate review in order to do substantial justice. *See* Tenn. R. Crim. P. 52(b). Rarely will plain error review extend to an evidentiary issue. Despite an untimely motion for new trial, this court may review the issues of sufficiency of the evidence and sentencing. *State v. Boxley*, 76 S.W.3d 381 (Tenn. Crim. App. 2001).

I. Sufficiency of the Evidence

On appeal, the Appellant asserts that the evidence in this case was insufficient to convict him of rape under count three because of the lack of detail in the victim’s recollection of the event. Specifically, he claims that his conviction on this count “may have resulted in a ‘patchwork verdict.’” In considering this issue, we apply the rule that where the sufficiency of evidence is challenged, the relevant question for the reviewing court is “whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 433 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). The scope of our examination of the evidence is not equivalent to that of the jury’s. In a challenge to the sufficiency of the evidence, this court does not retry the defendant. We emphasize that our examination in a sufficiency review is not to revisit inconsistent, contradicting, implausible, or non-credible proof, as these issues are resolved solely by the jury. Rather, we look to the record to determine whether there was substantive

probative evidence to support the verdict. The second inquiry, the question of legal sufficiency, then follows: whether the record contains evidence from which the jury could have found the essential elements of the crime beyond a reasonable doubt. Every reasonable hypothesis of innocence need not be dispelled; it is only necessary that there exists proof which supports the elements of the crime. The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given to the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

“A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Tennessee Code Annotated section 39-13-503(a)(1) (2003) defines rape in pertinent part as “unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by . . . (1) [f]orce or coercion . . . to accomplish the act[.]” The proof at trial, viewed in a light most favorable to the State, established that with regard to count three, the Appellant drove the victim to the Cumberland County community of Linary where he parked behind a number of garbage dumpsters. The Appellant grabbed the victim’s hands, proceeded to unzip her pants and sexually penetrated the victim vaginally as she sat in the passenger seat. The victim testified she was unable to move and could not fight back. The victim testified to these actions at trial, and the credibility of a witness is a factual issue resolved by the trier of fact. We will not reweigh or revalue such determinations on appeal. *See Cabbage*, 571 S.W.2d at 835. Moreover, the Appellant admitted to his actions on the audiotape introduced into evidence at trial. Although the victim testified that she was unsure of the exact date that this offense occurred, it is impossible that the jury formed a “patchwork verdict,” as the State alleged specifically that count three occurred in April of 1997 while alleging that the first two counts took place in March of 1997 and that the final two counts occurred in October and December of 1998 respectively. Moreover, the jury was presented with more than ample evidence by which it could find the Appellant guilty on each of the five counts of rape. Accordingly, we conclude that this issue is without merit.

II. Sentencing

The Appellant also argues that the trial court excessively sentenced him by misapplying enhancing factors and ordering that his sentences be served consecutively. When an accused challenges the length, range, or manner of sentence, this court has a duty to conduct a *de novo* review

of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *Ashby*, 823 S.W.2d at 169. When conducting a *de novo* review of a sentence, this court must consider: (a) the evidence, if any, received at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (1997); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000).

A. Sentence Enhancement

The Appellant was convicted of five counts of rape, Class B felonies, which carry a sentencing range of eight to twelve years. T.C.A. § 40-35-112(2) (2003). Review of the record in this case reveals that the trial court found two applicable enhancing factors: (1) the offense involved a victim and was committed to gratify the defendant’s desire for pleasure or excitement and (2) an abuse of a position of public or private trust. *See* T.C.A. § 40-35-114(8), (16) (2003). Additionally, it found applicable one mitigating factor, namely that the Appellant’s conduct neither caused nor threatened serious bodily injury. *See* T.C.A. § 40-35-113(1) (2003). The trial court found that the enhancing factors outweighed the mitigating factors.

Following *de novo* review, we find the trial court’s application of enhancing factor (8), *i.e.*, the offense involved a victim and was committed to gratify the Appellant’s desire for pleasure or excitement, was improper. Enhancement factor (8) calls into question the Appellant’s motive for committing a crime. *State v. Kissinger*, 922 S.W.2d 482, 491 (Tenn. 1996); *see also State v. Arnett*, 49 S.W.3d 250, 261-62 (Tenn. 2001). “Human motivation is a tangled web, always complex and multifaceted.” *Kissinger*, 922 S.W.2d at 491. Proving an appellant’s motive will always be a difficult task. *Id.* “But the legislature . . . has placed that obligation on the State when the State seeks an enhanced sentence.” *Id.* It has been determined that factor (8) may be applied where there is “evidence including, but not limited, to sexually explicit remarks and overt sexual displays made by the defendant, such as fondling or kissing a victim or otherwise behaving in a sexual manner, or remarks or behavior demonstrating the defendant’s enjoyment of the sheer violence of the rape.” *Arnett*, 49 S.W.3d at 262. This court has often held that this factor does not apply when no proof exists that the offense was committed to gratify the Appellant’s desire for pleasure or excitement above and beyond that inherent in the act of rape itself. *See e.g., State v. Jody Lane Orr*, No. W2001-02075-CCA-R3-CD (Tenn. Crim. App. at Jackson, Nov. 27, 2002), *perm. to appeal denied*, (Tenn. 2003). The trial court found that this factor applied because the Appellant “made a statement to the child victim that if he couldn’t get it from the child’s mother, he could get it from the child, referring to sexual acts, penetration.” While we would agree that the Appellant’s comment added further indignity to the victim, this comment alone does not establish that the Appellant’s conduct

was motivated by a desire for pleasure or excitement. Because we find the proof does not preponderate in favor of factor (8), its application is rejected.

The second enhancement factor, that the Appellant was in a position of private trust, is clearly appropriate in this case. During the period in which the rapes at issue in this case occurred, the Appellant was either the boyfriend of the victim's mother or victim's ex-step-father. For a considerable amount of time, he lived in the victim's house with her mother. By virtue of the Appellant's relationship with the victim's mother and his position of custodial control within their home, the Appellant abused a position of "presumptive private trust." *State v. Guiterrez*, 5 S.W.3d 641, 645 (Tenn. 1999).

The State also asks this court to consider applying enhancing factor (2), that the Appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, notwithstanding the trial court's failure to do so. First, we would note that the Appellant's pre-sentence report, which would include criminal history, is not included in the record despite a supplemental order specifically requiring that it be included. As support for its position that the record contains evidence of the Appellant's prior criminal history, the State references page 13 of the sentencing hearing transcript, as well as sentencing exhibits 1 and 3. Review of page 13 of the sentencing transcript contains the pre-sentence officer's statement that "he has no prior convictions that I'm aware of." The pre-sentence officer further testified that the Appellant "has some arrests for some violations of orders of protection and the state considers those noncriminal." Moreover, as this court has repeatedly held, an arrest or criminal charge does not constitute criminal behavior within the meaning of Tennessee Code Annotated § 40-35-114(2). *State v. Marshall*, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). With regard to the State's argument that the exhibits show "prior arrests for violating orders of protection, domestic assault, driving on a revoked license, and stalking of a minor," we conclude that such exhibits are not contained in the record. Accordingly, we find that enhancement factor (2) does not apply in this case.

The record reflects that the trial court also applied mitigating factor (1), that the Appellant's criminal conduct neither caused nor threatened serious bodily injury. Every rape is physically and mentally injurious to the victim. See *Kissinger*, 922 S.W.2d at 487. This court has previously stated that "[i]t is difficult to conceive of any factual situation where the rape of a child would not threaten serious bodily injury." *State v. Brian Keith Gilmer*, No. E2001-01474-CCA-R3-CD (Tenn. Crim. App. at Knoxville, June 20, 2002) (emphasis added) (quoting *State v. Edward Earl Huddleston*, No. 02C01-9706-CC-00228, (Tenn. Crim. App. at Jackson, Feb. 20, 1998)). Serious bodily injury does include a mental element. *Huddleston*, No. 02C01-9706-CC-00228. The record demonstrates that the victim in this case suffered psychological and emotional injuries. Moreover, the Appellant threatened to kill the victim and her family if she told her mother about the rapes. Accordingly, we conclude that the trial court incorrectly applied mitigating factor (1). In sum, we conclude that a sentence of eleven years is justified based upon the application of enhancement factor (16), abuse of a position of private trust, as it was this trust which was instrumental in facilitating the victim's rapes.

B. Consecutive Sentencing

Additionally, the Appellant argues that the trial court erred in imposing consecutive sentences. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds that:

(5) [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

T.C.A. § 40-35-115(b)(5) (2003). Based upon our *de novo* review of the record, we conclude that Tennessee Code Annotated section 40-35-115(b)(5) supports consecutive sentencing in this case.² The Appellant stands convicted of five counts of rape involving a thirteen-year-old victim over an extended period of time, arising out of the victim's trust of the Appellant. Moreover, from the testimony of the victim's mother at the sentencing hearing, the trial court concluded that the victim suffered from "mental damage . . . as result of these continuous rapes in this home," dropped out of school, was withdrawn, and is in need of counseling. Accordingly, we conclude that the trial court's imposition of partial consecutive sentences is appropriate.

CONCLUSION

Based upon the foregoing, we affirm the Appellant's judgments of conviction for five counts of rape and effective twenty-two year sentence.

DAVID G. HAYES, JUDGE

²The Appellant's reliance upon *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995), is misplaced as *Wilkerson* has application only to consecutive sentences imposed based upon a finding that the defendant meets the criteria of a "dangerous offender" under Tennessee Code Annotated section 40-35-115(b)(4).